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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 76

THE ALLEGHENY LUDLUM STEEL CORPORATION,
Appellant,

v.

WILLIAM J. KELLEY ET AL., CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK.

On Appeal from the Supreme Court of the State of New York for the County of Chautauqua.

BRIEF FOR APPELLANT.

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On Appeal from the Supreme Court of the State of New York for the County of Chautauqua.

BRIEF FOR APPELLANT.

I.

OPINIONS BELOW.

The opinion delivered on July 27, 1944, in the Supreme Court of the State of New York for the County of Chautauqua is reported in 184 N. Y. Misc. 47.

On appeal, the Appellate Division, Fourth Department, of the Supreme Court of New York affirmed unanimously without opinion on May 2, 1945. Its order is reported in 269 N. Y. App. Div. 805.

On appeal, the Court of Appeals of the State of New York affirmed unanimously without opinion on November 29, 1945. Its order is reported in 295 N. Y. 607.

II.

JURISDICTION.

(a) The statutory provision believed to sustain the jurisdiction is Section 237(a) of the Judicial Code of the United States (U. S. C., Title 28, § 344(a)).

(b) The statute of the State, the validity of which is involved, is the Labor Law of the State of New York, Article 20, L. 1937, c. 443, § 1, as amended, 30 McKinney's Consolidated Laws §§ 700-716, effective May 20, 1937, and particularly Section 705 thereof, providing (inter alia) that the State Labor Relations Board shall decide the unit appropriate for the purposes of collective bargaining and whenever it is alleged by an employee or an employer that there is a question (with an exception not material in this case) concerning the representation of employees, shall investigate such question and certify the name or names of the representatives who have been designated or selected. The validity of the said statute is involved insofar as it applies to employees engaged in interstate commerce. A copy of the said statute is attached hereto as Appendix A.

(c) The date of the judgment sought to be reviewed was November 30, 1945, and the date upon which the application for appeal was presented was February 19, 1946. The appeal was allowed on February 23, 1946.

III.

STATEMENT OF THE CASE.

This is an appeal from a dismissal on the merits by the New York courts of a complaint praying for a declaratory judgment and an injunction.

Appellant is a Pennsylvania corporation registered to do business in the State of New York. It owns steel plants in Brackenridge, Pa., in West Leechburg, Pa., in Dunkirk, N. Y., in Michigan and in California, along with warehouses in various other states (R. 8, 22, 58, 59). Approximately 95%, by value, of the products shipped from its Dunkirk, N. Y., plant are shipped to points outside the State of New York; 86%, by value, of the raw materials used at the plant are brought from points outside the State; and 85%, by value, of partially fabricated materials brought to the plant for further fabrication are from outside the State (R. 10, 22).

It was stipulated that on June 29, 1942, the C.I.O. was certified by the National Labor Relations Board as collective bargaining representative of appellant's employees, other than foremen, employed at appellant's five plants, including plants at Brackenridge and West Leechburg, Pa., and at Dunkirk, N. Y., and a single contract was made covering employees, other than foremen, at these plants (R. 58).

At the time when the complaint was filed the National Labor Relations Board had a definite policy of refusal to certify units composed of foremen or other employees with supervisory duties as appropriate for purposes of collective bargaining, except under circumstances not here present (R. 10-11, 30, 49, 58, 61). The Regional Director of the National Labor Relations Board

at Buffalo, N. Y., being the Board official in charge of the area in which appellant's Dunkirk plant is located, stated in a letter to the Regional Attorney of the New York State Labor Relations Board, dated February 22, 1944, that a petition seeking certification for foremen at appellant's Dunkirk plant as a separate bargaining unit would have been dismissed (R. 45). This policy of the National Labor Relations Board has since been reversed.

Though it conceded that appellant is engaged in interstate commerce (R. 22), on December 30, 1943, Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, filed with appellees, constituting the New York State Labor Relations Board, a petition requesting that the Board investigate a question or controversy existing concerning the representation of foremen at appellant's Dunkirk plant and further requesting that the Board, upon completion of its investigation, certify to the parties the name of the collective bargaining representative selected by such employees, pursuant to the provisions of the New York State Labor Relations Act (R. 15, 20-21). Section 715 of that Act provides that it

> "* * * shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act * * *."

Appellees refused to agree with appellant that the employees at the Dunkirk Plant were subject to and protected by the provisions of the National Labor Relations Act, and continued to assert jurisdiction of the matters covered by the petition (R. 10, 33). Appellees held hearings and issued a Decision and Direction of Election on May 24, 1944, requiring an election to be held among ap-

pellant's foremen to determine whether they desired to be represented for the purposes of collective bargaining by Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58 (R. 16, 20-38).

Before the issuance of appellees' Decision and Direction of Election appellant, on April 14, 1944, commenced this action in the Supreme Court of New York, Chautauqua County, by service of summons and complaint, stating that it was threatened with substantial and irreparable injury and had no adequate remedy at law, and praying that a declaratory judgment be made and entered decreeing (*inter alia*) that appellees had no jurisdiction in the premises and that they be restrained and enjoined from holding or attempting to hold an election or from taking any other action in connection with appellant or its employees under the provisions of the New York State Labor Relations Act (R. 7-14). By order dated October 3, 1944, the complaint was dismissed on the merits and not as a matter of discretion and judgment was accordingly entered for appellees (R. 2-3, 5-6).

On appeal to the Appellate Division, Fourth Department, of the Supreme Court of New York, the judgment was affirmed (R. 65-66). And on appeal to the Court of Appeals of New York it was again affirmed, on November 30, 1945, and the record was remitted to the Supreme Court (R. 67-68). The order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court for the County of Chautauqua on December 26, 1945, and judgment was entered thereon on December 28, 1945 (R. 68-71). The present appeal was then taken. Probable jurisdiction was noted on April 22, 1946 (R. 79).

IV.

ASSIGNMENTS OF ERROR.

Appellant specifies the following errors as those which are intended to be urged:

1. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the Labor Law, Article 20, L. 1937, c. 443, § 1, as amended, 30 McKinney's Consolidated Laws §§ 700-716, effective May 20, 1937, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board under the provisions of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. §§ 151-166, approved July 5, 1935. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

2. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the said Labor Law, gave the appellees jurisdiction to

cide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board, which under the provisions of the said National Labor Relations Act had already certified a representative for purposes of collective bargaining for other employees of the appellant at the same plant. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

3. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the said Labor Law, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of supervisory employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board, which under the provisions of the said National Labor Relations Act had already certified a representative for purposes of collective bargaining for other employees of the

appellant at the same plant and had expressed a policy against recognizing supervisory employees as constituting an appropriate collective bargaining unit. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

V.

SUMMARY OF ARGUMENT.

I. The New York State Labor Relations Act as here applied unconstitutionally invades the field occupied by the National Labor Relations Act.

A. The foremen employees involved here are engaged in interstate commerce and covered by the provisions of the National Labor Relations Act. The power granted by that act to the National Labor Relations Board to decide the unit appropriate for the purposes of collective bargaining of such employees and to certify the representatives designated for such purposes by the majority of the employees in the unit precludes such a decision and certification by the New York State Labor Relations Board.

Congress has occupied the field of determination of units appropriate for the purposes of collective bargaining of employees in interstate commerce. If Congress had intended that State power over such collective bargaining should continue, it would have so provided in a

saving clause in the National Labor Relations Act. On the contrary, the act provides that the power of the National Labor Relations Board to prevent any unfair labor practice affecting interstate commerce (including the refusal by an employer to bargain collectively with the representative of his employees) "shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise" (§ 10(a)).

The New York statute as applied to interstate commerce employees must be held unconstitutional, because in the matter of certification of bargaining representatives the National Act and the New York Act cannot operate without impinging upon one another.

To effect the policies of the National Labor Relations Act the National Board must have the power to refrain from action as well as the power to act, so that it may decline or may determine to certify representatives for supervisory employees, in either case without being thwarted by State boards or State courts.

The act of usurpation of the authority of the National Board by the State Board in this case cannot be corrected in any other way than by review of the decision of the highest court of New York by this Court.

B. Even if the provisions of the New York State Labor Relations Act did not conflict with the provisions of the National Act, the State Board could not decide the unit appropriate for collective bargaining.

Congress has said that the National Labor Relations Board shall decide in each case the unit appropriate whenever a question affecting interstate commerce

arises concerning the representation of employees. It did not grant power to State boards to do whatever the National Board could or should do.

"Coincidence is as ineffective as opposition" where a State attempts regulation in a field occupied by Congress.

The contention that lack of conflict with existing federal regulation will justify State regulation is based on a misapprehension of certain cases in which Congress had not occupied a field so wide as to preclude the State regulation involved. In the case at bar Congress has laid its hand squarely on the specific matter of the determination of appropriate bargaining units and the certification of bargaining representatives for interstate commerce employees, and the State of New York cannot lay its hand on the identical matter.

C. The provisions of the New York State Labor Relations Act conflict with the provisions of the National Act.

The National Act provides that the National Board shall decide whether the unit appropriate for the purpose of collective bargaining shall be "the employer unit, craft unit, plant unit, or subdivision thereof." The New York Act allows the New York Board to decide whether the unit appropriate shall be any of these units, the multiple employer unit, or any other unit, but provides that in any case where the majority of employees of a particular craft shall so decide the Board *shall* designate such craft as an appropriate unit. Of course the New York Board *cannot*, and the National Board can, designate an employer unit where the employer has plants in another State also, as the appellant has.

The policy of the National Act is to eliminate the causes of obstructions to the free flow of commerce and to mitigate and eliminate such obstructions. The purpose of the New York Act is the protection of the public welfare, prosperity, health and peace of the people of New York.

The fact that the State and National acts leave the determination of appropriate bargaining units to administrative tribunals is a source of conflict between the acts. Such a determination involves the exercise of discretion and administrative strategy. It could not be expected that the two boards would arrive at the same answer to a problem. The decisions of the two boards have in fact conflicted in the very matter of supervisory employees.

D. The subjection of the appellant to State regulation in a matter affecting interstate commerce in which it is subject to regulation and regulated by Act of Congress imposes an undue burden on such commerce.

II. Even if the New York Labor Relations Board had power to decide the unit appropriate for the purposes of collective bargaining of employees engaged in interstate commerce, the exercise of jurisdiction by the National Labor Relations Board precluded the exercise of jurisdiction by the State Board in this case.

A. The C.I.O. is the collective bargaining representative of appellant's employees, other than foremen, employed at its plants in Pennsylvania and New York. Exercise of jurisdiction by the National Board over interstate employees in the same plant with the employees here involved is sufficient to terminate any juris-

diction of the State Board over such employees. This exercise of jurisdiction was an occupation of the field. The National Board cannot determine an appropriate unit for the rank-and-file employees without considering the collective bargaining rights of the foremen. The State Board should not be permitted to tinker with what the National Board has done in the matter, particularly since there is no way in which the National Board may counteract the results of the tinkering.

B. The National Board's declaration of policy as to foremen employed in interstate commerce is sufficient to terminate any jurisdiction of the State Board over them. That declaration of policy was an occupation of the field. When this action was commenced, the policy of the National Board was to refuse to certify representatives of foremen, and its policy was flouted by the New York court. The National Board, by its subsequent reversal of its policy, did not retroactively relinquish its exclusive power in the premises and ratify previous usurpation of that power by the State Board.

VI.

ARGUMENT.

Point I. The New York State Labor Relations Act as Here Applied Unconstitutionally Invades the Field Occupied by the National Labor Relations Act.

There is no dispute as to the fact that the foremen employees involved here are engaged in interstate commerce (R. 8, 10, 22, 58, 59). Nor has it been contended that they are not covered by the provisions of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. §§ 151-166, Section 9 of which provides in part:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees,

the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

Yet appellees assert that, because the National Labor Relations Board has not ascertained and certified collective bargaining representatives for the employees here involved, they, as the New York State Labor Relations Board, may investigate, decide what bargaining unit is appropriate, and certify the names of representatives with whom appellant is required to bargain.

We shall undertake to demonstrate that the power granted by the National Labor Relations Act to the National Labor Relations Board to decide the unit appropriate for the purposes of collective bargaining of employees engaged in interstate commerce and to certify the representatives designated for such purposes by the majority of the employees in the unit precludes such a decision by a State labor relations board; that even if the provisions of the New York State Labor Relations Act did not conflict with the provisions of the National Act, the State Board could not decide the unit appropriate for collective bargaining or certify representatives for employees engaged in interstate commerce; and, moreover, that the provisions of the New York Act do conflict with the provisions of the National Act. We maintain that the New York Act under the circumstances

is unconstitutional also as an undue burden on interstate commerce.

A. *The Power Granted to the National Labor Relations Board to Decide the Unit Appropriate for the Purposes of Collective Bargaining of Employees Engaged in Interstate Commerce Precludes Such a Decision by a State Labor Relations Board.*

It cannot be contended that Congress does not have power to occupy the field of collective bargaining for employees in interstate commerce so as to exclude State action in that field. If the National Labor Relations Act specifically stated that the power of the National Labor Relations Board is to be exclusive, it could not be doubted that Congress had occupied the field. It is submitted that where, as here, Congress has given to the National Board the power to decide the unit appropriate for the purposes of collective bargaining of employees in interstate commerce and to certify the representatives of employees in such unit, the States have no power to do the same sort of thing, because Congress has in effect occupied the entire field and indicated that the matter is to be dealt with by the nation, not the States.

In *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, the Court said, by Mr. Justice Rutledge (p. 123):

> "The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. *e. g.*, Sen. Rep. No. 573, 74th Cong., 1st Sess. 2-4."

The report referred to is that of the Committee on Education and Labor, in which Senator Walsh said of the bill (S. 1958) which later became the National Labor Relations Act (p. 19):

> "While this bill of course does not intend to go beyond the constitutional power of Congress, as that power may be marked out by the courts, it seeks the full limit of that power in preventing these unfair labor practices."

To which this Court added in *Polish National Alliance v. National Labor Relations Board,* 322 U. S. 643, speaking by Mr. Justice Frankfurter (p. 647):

> "By that Act, Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate."

If Congress had intended that State power over collective bargaining by interstate commerce employees should continue after the enactment of the National Labor Relations Act, it would have so provided in a saving clause, as it did, for example, in the Act of April 29, 1878, 20 Stat. 37, quoted in *Morgan's S.S. Co. v. Louisiana Board of Health,* 118 U. S. 455, 465; in § 27 of the Federal Power Act of 1920, 41 Stat. 1063, 1077, 16 U.S.C. § 821; in the Act of April 13, 1926, 44 Stat. 250, amending § 8 of the Plant Quarantine Act of 1912, 37 Stat. 315, 318, 7 U.S.C. § 161; in § 3 of the Act of March 3, 1927, 44 Stat. 1355, 7 U.S.C. § 496; in § 15 of the Perishable Agricultural Commodities Act of 1930, 46 Stat. 531, 537, 7 U.S.C. § 499o; in § 18 of the Securities Act of 1933, 48 Stat. 74, 85, 15 U.S.C. § 77r; in § 7 of the Act of June 10, 1933, 48 Stat. 123, 124, 7 U.S.C. §587; in §28 of the

Securities Exchange Act of 1934, 48 Stat. 881, 903, 15 U.S.C. § 78bb; in § 18 of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1069, 29 U.S.C. § 218; and in § 50 of the Investment Company Act of 1940, 54 Stat. 789, 846, 15 U.S.C. § 80 a-49. These acts were all cases of exercise by Congress of its power within a field where the States had previously had regulatory power, and to preserve that power Congress thought it necessary expressly to save it. That Congress in the National Labor Relations Act failed to save to the States their regulatory power shows the intention that the States shall be excluded from the field, as the Court, speaking by Mr. Justice Burton, indicated in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 66 S. Ct. 906. In order to preserve the power of the States an Act of Congress must contain an express saving clause, "if the usual rules of supersedure are to be overcome" (p. 917); and "in those fields where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course" *(ibid.)*.

That the power given to the National Board to determine the appropriate bargaining unit and certify bargaining representatives is exclusive of State power is further demonstrated by the provisions of Section 10(a) of the National Labor Relations Act, which provides (29 U.S.C. § 160(a)):

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

One of the unfair labor practices listed in Section 8 is the refusal by an employer "to bargain collectively with the representatives of his employees." Section 9, in turn, is the section here directly involved, providing for the designation of such representatives. Since the National Board, under Section 10(a), has *exclusive* jurisdiction to prevent refusal to bargain with "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" (Section 9(a)), who by the terms of the latter section are to be "the exclusive representatives of all the employees in such unit for the purposes of collective bargaining," then the National Board is the only body which can decide what is a "unit appropriate" for such purposes. Within the field of interstate commerce, only the National Board, therefore, can determine bargaining units, certify representatives, and prevent refusal to bargain with such representatives. Congress's scheme leaves no room for regulation of these matters by the States.

In the court below appellees relied upon *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U. S. 740, to sustain their claim that Congress did not supersede the power of the State to designate appropriate units and certify bargaining representatives of interstate employees. That case not only does not support the claim of the appellees; it shows it to be untenable. There the Wisconsin Board ordered a union and its officers and members to cease and desist from mass picketing, threatening employees, obstructing or interfering with factory entrances or the free use of public streets and roads and picketing the homes of employees. This Court, in an opinion by Mr. Justice Douglas, said (p. 749):

"Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board."

The Court added (p. 751):

"If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise."

In the case at bar the "distinctly different question" with regard to the "status of the employees" for purposes of collective bargaining does arise, and the State Board's action directly affects the collective bargaining rights of the employees.

In *Hill v. Florida,* 325 U. S. 538, the question was whether a Florida statute regulating union activities had been applied to the petitioners in a manner which brought it into conflict with the collective bargaining regulations of the National Act. The Florida statute provided that no one should be licensed as a "business agent" of a labor union who had not been a citizen of the United States for more than ten years, who had been convicted of a felony, or who was not a person of good moral character. A "business agent" was defined, *inter alia*, as "any person who shall for a pecuniary or financial consideration act or attempt to act" for a union "in soliciting or receiving from any employer any right or privilege for employees." This Court said, in an opinion by Mr. Justice Black, that the question affecting the status of employees or causing a forfeiture of collective bargaining rights, which was reserved in the Wisconsin case, had now arisen (p. 539). The Court held that the Florida Act was unconstitutional as circumscribing "the 'full freedom' of choice which Congress

said employees should possess" (p. 541) and because the National Act and the Florida Act as there applied could not "move freely within the orbits of their respective purposes without impinging upon one another" (p. 543).

So in the case at bar the New York statute as here applied must be held unconstitutional, because in the matter of certification of bargaining representatives the National Act and the New York Act cannot operate without impinging upon one another.

That the right of a State to regulate interstate commerce in the exercise of its police power ceases when Congress regulates the same subject matter is settled by a long line of decisions of this Court.

The principle which governs as to the effect of the National Labor Relations Act in the case at bar was laid down in *Northern Pacific Ry. Co. v. State of Washington*, 222 U. S. 370, a case involving the Hours of Service Act, where the Court said, in an opinion by Mr. Chief Justice White (pp. 378-379):

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed

from the sphere of the operation of the authority of the State. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute."

This case shows clearly the meaning of the term "concurrent power." The States can exercise "concurrent power" in the silence of Congress. When Congress speaks so as to exercise *its* power, the power of the States is cut off as to the field of regulation which Congress has occupied. They can then act only to the extent that Congress preserves their power. If Congress does not save any power in the States, their power is at an end, even though Congress has done no more than occupy the field, without effective regulation. The position of the respondents in the case at bar misconceives the true interpretation of the term "concurrent power."

The principle was laid down again in *Southern Ry. Co. v. Reid*, 222 U. S. 424, with regard to the Interstate Commerce Act. The Court said, in an opinion by Mr. Justice McKenna (pp. 436, 437, 441, 442):

"It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised. * * *

* * * * * * *

"* * * There is no contention that the Commission has acted, so we must look to the act. Does it, as contended by plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the State cannot even supplement? In other words, has Congress taken possession of the field?

* * * * * * *

"* * * The question is, Where is the control, in the State or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the Interstate Commerce Act to which we have referred. * * *

* * * * * * *

"* * * Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved and there is given to the States the power which is the States' and to Congress the power which belongs to Congress."

Again, in the *Second Employers' Liability Cases*, 223 U. S. 1, the Court said by Mr. Justice Van Devanter (pp. 54-55):

"True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the

States in the absence of action by Congress. *Sherlock v. Alling*, 93 U. S. 99; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482; *Nashville &c. Railway v. Alabama*, 128 U. S. 96, 99; *Reid v. Colorado*, 187 U. S. 137, 146. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna*, 21 Wall. 558, 581; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado and Santa Fe Railway Co. v. Hefley*, 158 U. S. 98, 104; *Southern Railway Co. v. Reid*, 222 U. S. 424; *Northern Pacific Railway Co. v. Washington*, 222 U. S. 370."

In *Oregon-Washington R. R. & Navigation Co. v. State of Washington*, 270 U. S. 87, an Act of Congress was involved which directed the Secretary of Agriculture to quarantine any State when necessary to prevent the spread of a dangerous plant disease or insect infestation. The State contended that until the Secretary had fixed or refused to fix quarantine lines it could not be said that Congress had occupied the field (p. 88). This contention the Court rejected, saying by Mr. Chief Justice Taft (pp. 102-103):

"Pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given

to the federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted."

Where Congress has given to a federal instrumentality the power to act in a particular field, the States can no longer regulate in that field, even though the power granted by Congress has not been exercised.

In *Napier v. Atlantic Coast Line R. R. Co.*, 272 U. S. 605, the question was "whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation" (p. 607). The case involved State statutes prescribing an automatic door to the fire-box and a cab curtain and it was assumed that there was "no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission" (pp. 610-611). The Court nevertheless held that the Boiler Inspection Act conferred upon that commission power to specify the sort of equipment to be used on locomotives and that the State statutes were unconstitutional, saying in an opinion by Mr. Justice Brandeis (pp. 612-613):

"The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal signifi-

cance. It is also urged that, even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose."

The important thing was that Congress had given the power to the Interstate Commerce Commission, and that this was enough to occupy the field and to preclude State legislation. Failure of the Commission to exercise its authority was of no legal significance. To the contention that the State could act because the Interstate Commerce Commission had not given full protection to railroad employees, the Court replied (p. 613):

"If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample."

The analogy to the case at bar is obvious. Here Congress has given the National Labor Relations Board full power to designate units and certify representatives. Congress has occupied the field. If at any time the

National Board's policy is deemed to slight any group of employees, application for a change must be made to it, not to State legislatures or administrative bodies. Failure of the National Board to act does not give the States power to act.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, is, with the exception of the *Allen-Bradley* case and *Hill v. Florida*, which have already been discussed (*supra*, pp. 18-20), the latest case in which the Court has dealt at length with the question whether State action in respect of a matter on which Congress has legislated under the commerce clause is superseded by the Act of Congress. The question there involved was a close one, because the practices prohibited by the respective statutes were different, the State statute providing for the inspection and seizure of packing stock butter and the federal statute regulating the manufacture of renovated butter, which is made from packing stock butter. No such difficult question arises in the case at bar, where the regulations in question deal with the identical subject matter, namely, the designation of representatives for collective bargaining. Nevertheless the Court in the *Cloverleaf* case held that the State legislation was superseded, saying, in an opinion by Mr. Justice Reed (p. 169):

> "It is said that the state and the United States have worked cooperatively in protecting consumers from vicious practices in the handling of processed butter; that any action by the state aids the policy of both in disposing of unfit food; and that therefore a harmonious federal-state relationship should not be hampered. Our duty to deal with contradictory functions of state and nation, on any occasion, and particularly when one or the other is challenged by

private interests, calls for the utmost effort to avoid conclusions which interfere with the governmental operations of either. Nothing could be more fertile for discord, however, than a failure to define the boundaries of authority. Clashes may and should be minimized by mutual tolerance; but they are much less likely to happen when each knows the limits of its responsibility. And, it is only reasonable to assume that the theory of denying inconsistent powers to a state is based largely upon the benefits to the regulated industry of freedom from inconsistencies.

"Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory, while it was under federal observation and while federal enforcement deemed it wholesome, would not only hamper the administration of the federal act but would be inconsistent with its requirements. Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject."

Though we believe that the numerous cases from which we have quoted above are conclusive of the question raised in the case at bar, we may nevertheless add that they are merely illustrative of a large body of authority of which the following cases also are instances: *Gibbons v. Ogden,* 9 Wheat. 1, 209-211; *Prigg v. Com-*

monwealth of Pennsylvania, 16 Pet. 539, 617-618; *Gulf, etc. Ry. Co. v. Hefley*, 158 U. S. 98, 104-105; *Easton v. Iowa*, 188 U. S. 220, 231-232; *Chicago, etc. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 435; *Adams Express Co. v. Croninger*, 226 U. S. 491, 505-507; *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 66-67; *New York Central etc. R. R. Co. v. Board of Chosen Freeholders of the County of Hudson*, 227 U. S. 248, 264; *St. Louis, etc. Ry. Co. v. Edwards*, 227 U. S. 265, 268-269; *St. Louis, etc. Ry. Co. v. Seale*, 229 U. S. 156, 158; *Erie R. R. Co. v. People of the State of New York*, 233 U. S. 671, 683; *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 446-448; *Charleston etc. Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604; *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 41-42; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 148-149; *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 172, 174; *New York Central etc. R. R. Co. v. Tonsellito*, 244 U. S. 360, 362; *United States v. Hill*, 248 U. S. 420, 427; *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, 569; *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 31; *Missouri Pacific R. R. Co. v. Stroud*, 267 U. S. 404, 408; *Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co.*, 271 U. S. 244, 249-250; *Missouri Pacific R. R. Co. v. Porter*, 273 U. S. 341, 345-346; *Northern Coal & Dock Co. v. Strand*, 278 U. S. 142, 147; *Lindgren v. United States*, 281 U. S. 38, 44-47; *Hines v. Davidowitz*, 312 U. S. 52, 66-69; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498, 510.

When the action of Congress in occupying a field of regulation cuts off the power of the States to make regulations within the field, even where the State regulations are not in conflict with what Congress has prescribed, or

even where Congress's regulations are not yet in effect, it follows *a fortiori* that when Congress has specifically regulated a particular item in a field the States are precluded from regulation of that particular item. Where Congress has said: "The [National Labor Relations] Board shall decide in each case * * * the unit appropriate for the purposes of collective bargaining," and "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify * * * representatives" (National Labor Relations Act, § 9 (b), (c)), a State cannot arrogate to itself the power to designate appropriate units and certify representatives in the field of interstate commerce.

In *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, the Court made quite clear that Congress intended the National Act to be the exclusive and controlling legislation in the field of interstate commerce. In holding that federal and not State law determines what constitutes an "employee" under the National Act, the Court said by Mr. Justice Rutledge (p. 123):

> "Persons who might be 'employees' in one state would be 'independent contractors' in another. They would be within or without the statute's protection depending not on whether their situation falls factually within the ambit Congress had in mind, but upon the accidents of the location of their work and the attitude of the particular local jurisdiction in casting doubtful cases one way or the other. Persons working across state lines might fall in one class or the other, possibly both, depending on whether the Board and the courts would be required

to give effect to the law of one state or of the adjoining one, or to that of each in relation to the portion of the work done within its borders.

"Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. *e.g.*, Sen. Rep. No. 573, 74th Cong., 1st Sess. 2-4. It is an Act, therefore, in reference to which it is not only proper but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law.' *Jerome v. United States,* 318 U. S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems."

If, then, the application of the federal act was not intended by Congress to be dependent on State law, could Congress have intended that State regulation might be applied to the subject matter which the National Act assigns to the National Labor Relations Board? Congress did not wish State law to determine what persons, as "employees," should be permitted to engage in collective bargaining in interstate commerce. No more did it wish State law to determine what units should be considered "appropriate," or what representa-

tives should be certified, for purposes of collective bargaining in interstate commerce. The entire federal statutory program would be impaired if State law could thus control. *Cf. Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 441 (Interstate Commerce Act); *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 503 (Employers' Liability Act); *United States v. Pelzer*, 312 U. S. 399, 402 (Revenue Act); *Jerome v. United States*, 318 U. S. 101, 104 (Bank Robbery Act); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 66 S. Ct. 906, 911-912 (Federal Power Act); *National Labor Relations Board v. Blount*, 131 F. (2d) 585, 590 (C.C.A., 8th Circ.), cert. den. 318 U. S. 791 (National Labor Relations Act).

It is reasonable and proper that Congress's grant of power to the National Labor Relations Board should cut off the power of the States, as above demonstrated. To effect the policies of the National Labor Relations Act the National Board must have the power to refrain from action as well as the power to act. Its exercise of the power to refrain from action is illustrated by its practice in *Matter of Maryland Drydock Co.*, 49 N. L. R. B. 733. There it declined to certify representatives for supervisory employees, deciding that such employees could not constitute appropriate units for collective bargaining. But nevertheless it claimed jurisdiction over supervisory employees engaged in interstate commerce and held that their status did not remove them from the protection of the National Labor Relations Act: *Matter of Soss Manufacturing Co.*, 56 N.L.R.B. 348. Such was the practice prevailing at the time when the case at bar was commenced. In this particular instance the effect of certification of bargaining representatives by

the State Board was then directly to thwart the National Board's practice and policy.

The National Labor Relations Board in *Matter of Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212, and subsequent cases, *Matter of B. F. Goodrich Co.*, 65 N.L.R.B. No. 58, *Matter of L. A. Young Spring & Wire Corp.*, 65 N.L.R.B. No. 59, *Matter of Jones & Laughlin Steel Corp.*, 66 N.L.R.B. No. 51, has reversed its former practice and at present undertakes to certify collective bargaining representatives for units of supervisory employees. This change, made by the Board for the avowed purpose of better effectuating the policies of the National Labor Relations Act, also illustrates the necessity for giving the National Labor Relations Board a free hand, unfettered by interfering State regulation. The National Board must make important decisions on the policy-forming level and then has the burden of putting them into practice. If State boards formed their own policies and were permitted to put them into effect, the National Board would find itself in the embarrassing position of trying to upset in some manner the presumptuous independent determinations of forty-eight conflicting authorities.

If the National Labor Relations Board, for instance, were today to decide that the best method to effectuate the provisions and policies of the National Labor Relations Act was to reverse its present approach and to return to the doctrine of the *Maryland Drydock* decision, what could it do to disestablish bargaining representatives certified by the New York State Labor Relations Board? Congress gave it no specific power to meet such a situation. The answer, of course, is that Congress did not need to provide such power, having given the

National Labor Relations Board *exclusive* power to determine the appropriate unit and to certify representatives for employees in interstate commerce. *Cf. Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U. S. 456, 467-468.

The conclusion to which the courts below came is thus expressed in the only opinion in the case, that of Hinkley, J., in the Supreme Court (R. 62):

> "The Court is not called upon nor does it desire to express its opinion of the logic or reasoning or right or wrong of the conflict of policy of the Federal and State Labor Relations Boards. In the absence of a definite intent of statutory regulation and in the further absence of judicial precedent, the Court cannot properly decree that in this instance the defendants are without jurisdiction to act simply because The National Labor Relations Board would not act under similar circumstances. Nor can the plaintiff arbitrarily refuse to recognize the State Labor Relations Board because it disagrees with the policy of that Board. Under the circumstances of this case, the plaintiff is called upon to co-operate to the fullest extent with the New York State Labor Relations Board and the certified representative of the foreman group or union until such time, if it arises, that the defendants are ousted from jurisdiction by The National Labor Relations Board."

It is submitted that the position so taken is specious. How can the National Board oust the State Board from jurisdiction? The Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, having found that the New York Board would certify

it as a bargaining agent when the National Board would not do so (R. 45), would certainly not seek for a review by the National Board of the decision in its favor even if it could do so, and it cannot do so if it would. The New York State Board, whose decision has been sustained, is not subject to the jurisdiction of the National Board. Its act of usurpation of the authority of that board can be corrected in no other way than by appeal to the New York courts and by review of the decision of the highest court of that State by this Court. The decision of the courts below in favor of the State Board means that that board may act and will act to determine the policy of collective bargaining of interstate commerce employees until this Court puts an end to the usurpation.

B. *Even if the Provisions of the New York State Labor Relations Act Did Not Conflict with the Provisions of the National Act, the State Board Could Not Decide the Unit Appropriate for Collective Bargaining.*

Appellees seek to justify their assumption of jurisdiction in the premises on the ground that the New York State Labor Relations Act and the National Act "are not only alike in their provisions, but are almost identical in their language," quoting from *Davega-City Radio v. New York State Labor Relations Board,* 281 N. Y. 13, 22. Even if this alleged near-identity were a fact, the State Board would still be without power to act here, because Congress in the National Labor Relations Act gave such power to the National Labor Relations Board and not to the State Board.

The argument of the appellees boils down to the assertion that their action is the same as that which would be taken by the National Labor Relations Board and therefore is not in conflict with or in violation of the National Board's jurisdiction. On the same basis could it not just as reasonably be argued that a New York commission could grant licenses to radio broadcasting stations provided it observed all the rules, regulations and policies which guide the Federal Communications Commission in granting licenses? Could the New York taxing authorities collect federal estate and income taxes, following exactly the Treasury Regulations, provided the money collected were all paid into the United States Treasury? Would the Governor and Senate of New York be justified in appointing a judge to fill a vacancy in a United States District Court, provided it could be demonstrated that the appointee was the same man who would have been appointed and confirmed in any case by the President and Senate of the United States?

Congress has said that the National Labor Relations Board "shall decide in each case" the unit appropriate (National Labor Relations Act, § 9(b)), and has given it power to make investigations and to certify bargaining representatives "whenever a question affecting commerce arises concerning the representation of employees" (National Labor Relations Act, § 9(c)). It did not grant power to State boards to do whatever the National Labor Relations Board could or should do.

In *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, it was contended in support of a State law requiring, under penalty, hand-holds for trainmen on the sides *or* ends of cars that it was not in

conflict with, but rather in aid of, a Federal statute requiring such hand-holds on *both* the sides *and* ends of cars. The Court, speaking by Mr. Justice Lamar, said in rejecting this contention (p. 448):

> "The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."

In *Charleston etc. Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, it was contended that the State statute there involved was "in aid of interstate commerce." The Court, speaking by Mr. Justice Holmes, in holding it invalid, said (p. 604):

> "It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden. *Southern Ry. v. Reid*, 222 U. S. 424, 443. But that is immaterial. When Congress has taken the particular subject-matter in hand *coincidence is as ineffective as opposition*, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." (Italics supplied.)

In *Missouri Pacific R. R. Co. v. Porter*, 273 U. S. 341, in which it was held that the Interstate Commerce Act precluded the enforcement of a State law forbidding stipulations in bills of lading exempting carriers from liability for loss by fire, the Court said, in an opinion by Mr. Justice Butler (pp. 345-346):

> "Congress must be deemed to have determined that the rule laid down and the means provided to en-

force it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction. *Napier v. Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Oregon-Washington Co. v. Washington*, 270 U. S. 87, 102; *Penna. R. R. Co. v. Pub. Service Comm.*, 250 U. S. 566; *Charleston & Car. R. R. Co. v. Varnville Co.*, 237 U. S. 597, 604; *Adams Express Co. v. Croninger*, 226 U. S. 491, 505; *Nor. Pac. Ry. v. Washington*, 222 U. S. 370, 378; *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 618; *Houston v. Moore*, 5 Wheat. 1, 21, 22."

See also *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 60-61; and *cf. Houston v. Moore*, 5 Wheat. 1, 23 (*infra*, p. 47).

The fact that "coincidence is as ineffective as opposition" where a State attempts regulation in a field occupied by Congress is implicit also in the decisions in the numerous cases cited in subdivision I-A of this argument (pp. 20-28). Only occasionally and incidentally have the opinions discussed the matter, because it is really too plain for argument in view of the supremacy of the national law: Constitution, Article VI, clause 2. The appellees therefore cannot sustain the New York statute as here applied, as they attempt to do largely, if not entirely, on the ground that coincidence with or subordination to the Act of Congress will avail where opposition to it would fail.

The contention that lack of conflict with existing federal regulation will justify State regulation in circumstances like those here present is doubtless based on a misapprehension of the import of certain cases in this Court. So far as our research has extended, they are the following: *Missouri, etc. Ry. Co. v. Haber,* 169 U. S. 613; *Reid v. Colorado,* 187 U. S. 137; *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.,* 211 U. S. 612; *Savage v. Jones,* 225 U. S. 501; *Missouri, etc. Ry. Co. v. Harris,* 234 U. S. 412; *Illinois Central R. R. Co. v. State Public Utilities Commission of Illinois,* 245 U. S. 493; *Atchison, etc. Ry. Co. v. Railroad Commission of California,* 283 U. S. 380; *Dickson v. Uhlmann Grain Co.,* 288 U. S. 188; *Mintz v. Baldwin,* 289 U. S. 346; *Gilvary v. Cuyahoga Valley Ry. Co.,* 292 U. S. 57; *Northwestern Bell Tel. Co. v. Nebraska State Railway Commission,* 297 U. S. 471; *Townsend v. Yeomans,* 301 U. S. 441; *Kelly v. Washington,* 302 U. S. 1; *Welch Co. v. New Hampshire,* 306 U. S. 79; *Eichholtz v. Public Service Commission of Missouri,* 306 U. S. 268; *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board,* 315 U. S. 740; *Parker v. Brown,* 317 U. S. 341; *Standard Dredging Corp. v. Murphy,* 319 U. S. 306. Most of these cases have been cited in the briefs for the appellees in the courts below. It is unnecessary to discuss them in detail. *Parker v. Brown* is clearly inapplicable here, because the federal Agricultural Marketing Agreement Act of 1937, which was there involved, "contemplates that its policy may be effectuated by a state program either with or without the promulgation of a federal program" (317 U. S. 341, 354). All the other cases are distinguishable from the case at bar in that the State regulation was upheld by the Court as not in conflict with Congressional regula-

tion because Congress had not occupied a field so wide as to preclude the State regulation involved.

But in the case at bar there can be no question at all as to whether Congress has occupied the field in which the State regulation is claimed to be effective. Congress has laid its hand squarely on the specific matter of the determination of appropriate bargaining units and the certification of bargaining representatives for interstate commerce employees. If the State of New York merely laid its hand on a related matter, a showing of lack of conflict of its regulation with the Congressional regulation might be in point: *cf. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, supra.* But here cases as to lack of conflict are not relevant. The State of New York could not lay its hand on the matter of the determination of appropriate bargaining units and the certification of bargaining representatives for interstate commerce employees without snatching the matter from under the hand of Congress.

C. *The Provisions of the New York State Labor Relations Act Conflict with the Provisions of the National Act.*

Even if the presence or lack of conflict between the National Labor Relations Act and the New York State Labor Relations Act were relevant and determinative, the State Act could not be applied to interstate commerce employees because of its basic differences from the National Act. There are a number of fundamental conflicts between the acts.

In the first place, the two acts prescribe divergent limits within which the respective boards may determine

appropriate bargaining units. Section 9(b) of the National Labor Relations Act provides:

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, *or subdivision thereof.*" (Italics supplied.)

Section 705, paragraph 2, of the State Act provides:

> "The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, *multiple employer unit,* craft unit, plant unit, *or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.*" (Italics supplied.)

It thus appears that the State Board has power to designate multiple employer units as appropriate, or to designate "any other unit." The power granted by Congress to the National Labor Relations Board is not so wide. In fact, the Conference Report (House Report No. 1371) of the Senate and House of Representatives on the bill (S. 1958) which later became the National Labor Relations Act clearly shows that by House Amendment No. 11 the phrase "or other unit" was cut out of § 9(b) for the very reason that it would allow too

wide a choice of types of units: *Congressional Record,* June 27, 1935, 74th Cong., 1st Sess., Vol. 79, Part 9, pp. 10259, 10298-10299.

In another respect, however, the State Board is more circumscribed than the National Board. The latter may determine the proper unit to be "the employer unit, craft unit, plant unit, or subdivision thereof." The State Board, on the other hand, cannot determine that the appropriate unit is *not* a craft unit if a majority of the employees of a particular craft vote for a craft unit.

The most important respect in which the New York State Board is circumscribed in its designation of an appropriate unit lies in its inability to designate an employer unit where the employer also has plants in another state, as in the case at bar. "Employer unit," under the terms of both the State and National acts, is one of the units which may be found to be appropriate. But if the employer's plants are in more than one State, the National Board can, and a State board can *not,* designate an employer unit; for a State board has no jurisdiction as to employees in another State. If the National Board were to certify a unit for appellant's foremen it might be logical for it to constitute the foremen in all plants as an appropriate unit. This the New York Board could not do. It is thus apparent that in the very application of the New York Act which is involved in this case there is a fundamental conflict with the National Labor Relations Act.

A second and even more basic conflict between the two acts lies in the differences in the purposes and policies declared in each of them. These differing policies of the two acts are binding upon the respective boards, and in both acts their effectuation is explicitly

required to be the basis for the decision as to appropriate bargaining unit. The National Labor Relations Act, § 1, states:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred * * *."

The New York State Labor Relations Act, § 700, declares:

> "This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state."

There may be completely different decisions as to whether a unit is appropriate, depending upon whether the deciding board seeks "to eliminate the causes of certain substantial obstructions to the free flow of commerce" or to protect "the public welfare, prosperity, health and peace of the people" of New York State. The National Act is designed to preserve "the balance of economic forces upon which the full flow of commerce depends": Senate Report No. 573, 74th Cong., 1st Sess., p. 19; *cf. National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31-32. Should a small group of employees be dissuaded from industrial strife by granting them bargaining autonomy, in order to prevent local breaches of the peace? Or should this appeasement be refused in order to secure more fully the rights of the mass of the workers whose toil and skill produce the goods which flow in the great stream of commerce among the States and to maintain the proper balance between labor and management? The National

and the State Acts take different approaches, and require different approaches by the two boards. *Cf. National Labor Relations Board v. Hearst Publications,* 322 U. S. 111, 123.

It may be added that, aside from the legislative differences, there must of necessity be a difference in the approach of the two boards by reason of their differing situations alone. The National Labor Relations Board views the problem to be solved from a national standpoint, in the light of experience on a national scale, and with considerations of a national scope in mind. A State board's experience, duty and inclinations do not extend to things which lie beyond the State's borders.

A third source of conflict between the State and National Act lies in the fact that the decisions as to the appropriate unit in each case are left to administrative tribunals. The decision as to what is an appropriate bargaining unit is more than a mere determination of fact. It involves the exercise of discretion. As Mr. Justice Rutledge, delivering the opinion of the Court, said in *National Labor Relations Board v. Hearst Publications,* 322 U. S. 111, at p. 134:

> "Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter. * * * The flexibility which Congress thus permitted has characterized the Board's administration of the section and has led it to resort to a wide variety of

factors in case-to-case determination of the appropriate unit."

Cf. May Department Stores Co. v. National Labor Relations Board, 326 U. S. 376, 380. The determination of an appropriate bargaining unit involves questions of policy which are legislative in their nature. It involves administrative strategy, the revision and constant adaptation of policy in changing circumstances and by reason of changing views as to expediency. To expect two different boards in such a state of facts to work like identical automatic computing machines and produce the same answer to a problem is to expect a most improbable coincidence. That such a coincidence can hardly occur is shown by actual experience in the case at bar. The New York Board's determination that appellant's supervisory employees constituted an appropriate bargaining unit was in the very teeth of the National Board's then current *Maryland Drydock Company* doctrine. At the same time, the State Labor Relations Board in Pennsylvania, where other plants of the appellant are located, was in agreement with the *Maryland Drydock Company* doctrine: *cf. Supervisory Employees' Union v. Pittsburgh Rys. Co.*, 93 Pitts. L. J. 47 (Allegheny County C. P. Ct., 1944). Recognition of regulatory power in the States would create conflict among State rulings as well as between State and national practices.

Finally, there is conflict between the two acts in the very fact that they establish two different boards charged with the duty of determining appropriate bargaining units and certifying bargaining representatives. It has been shown that the two boards must follow different statutory standards, pursue different policies,

and in any event arrive at variant decisions. But the conflict goes even deeper. Congress established a *single* board. When New York sets up *another* board and gives it jurisdiction over the same interstate subject matter, there is an initial and unavoidable conflict. The fundamental conflict lies in the fact that the same jurisdiction is given to each of the two boards.

Gulf, etc. Ry. Co. v. Hefley, 158 U. S. 98, by Mr. Justice Brewer, at p. 105:

> "The state statute and the national law operates upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the States. The state statute must, therefore, give way."

New York Central etc. R. R. Co. v. Board of Chosen Freeholders of the County of Hudson, 227 U. S. 248, by Mr. Chief Justice White, at p. 264:

> "In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being co-terminous with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. The conception of the operation at one and the same time of both the

power of Congress and the power of the States over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate."

D. *The New York State Labor Relations Act Unduly Burdens Interstate Commerce.*

Before 1789 the States bound heavy burdens and grievous to be borne, and laid them on the shoulders of men engaged in commerce among the States. Doubtless the removal and the prevention of such burdens was, and is, the main purpose of the grant of power to Congress to regulate interstate commerce. When Congress has constitutionally regulated collective bargaining of employees engaged in such commerce, "it is only reasonable to assume that the theory of denying inconsistent powers to a state is based largely upon the benefits to the regulated industry of freedom from inconsistencies": *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, by Mr. Justice Rutledge, at p. 169. Further regulation of the same subject matter by the States would impose an intolerable burden upon persons engaged in interstate commerce. No man can serve two masters.

The principle upon which the Court should act in this case was enunciated as long ago as 1820. Acts of Congress authorized the President in certain cases to call forth such number of the militia of the States as he might judge necessary and to issue his orders for that purpose. Every officer or private who should fail to obey the orders of the President was liable to pay a fine to be determined by a court-martial and to be impris-

oned on failure of payment. In *Houston v. Moore,* 5 Wheat. 1, the question arose as to whether it was competent for a court-martial deriving its jurisdiction under State authority to try and to punish militiamen called forth by the President into the service of the United States who had refused or neglected to obey the call. A majority of the Court held the State statute constitutional on a narrow ground which has no application here, but Mr. Justice Washington, delivering the judgment of the Court, said (pp. 22-24):

> "This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim. If, in a specified case, the people have thought proper to bestow certain powers on congress, as the safest depositary of them, and congress has legislated within the scope of them, the people have reason to complain, that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time, compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment, for a certain

offence, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive, how they can both consist harmoniously together.

"I admit, that a legislative body may, by different laws, impose upon the same person, for the same offence, different and cumulative punishments; but then it is the will of the same body to do so, and the second, equally with the first law, is the will of that body; there is, therefore, and can be, no opposition of wills. But the case is altogether different, where the laws flow from the will of distinct co-ordinate bodies. This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other."

Point II. The Exercise of Jurisdiction by the National Labor Relations Board Precludes Exercise of Jurisdiction by the State Board in This Case.

The appellees claim that their power to decide what bargaining unit is appropriate and to certify bargaining representatives subsists in the absence of exercise by the National Labor Relations Board of its power. But if this were so, the appellees would have no jurisdiction here, because the National Board has sufficiently exercised its jurisdiction to terminate whatever temporary jurisdiction the State Board might have had. The National Board has assumed and exercised jurisdiction as to appellant's other employees than supervisory employees in the plant here involved and other plants engaged in interstate commerce; and if this were not enough, it has in addition declared its policy as to the particular type of employees here involved.

A. *Exercise of Jurisdiction by the National Board over Interstate Employees in the Same Plant with the Employees Here Involved Is Sufficient to Terminate Any Jurisdiction of the State Board over Such Employees.*

It is stipulated in this case (R. 58) that the C.I.O. has been certified by the National Labor Relations Board as collective bargaining representative of appellant's employees, other than foremen, employed at its plants in Pennsylvania and New York. This constitutes such exercise of jurisdiction by the National Labor Relations Board as to the supervisory employees here involved

as to cut off the New York State Labor Relations Board's power over them, if it ever had any such power.

Exercise of jurisdiction over all the employees save foremen is an assumption of jurisdiction over the foremen as well. The collective bargaining process is not so simple as to make possible the separate consideration of the bargaining rights of rank-and-file employees and those of their immediate supervisors. The foremen are drawn from the rank and file. At times they may return to the latter group. Pay differentials are perhaps the most important factor involved in the inducement to assume the greater responsibilities resting upon a foreman, so that the wages of the rank and file have a direct bearing on those of the foremen. The National Labor Relations Board cannot determine an appropriate unit for the rank and file without considering the rights and position of the foremen. At least so far as a particular plant is concerned, the status of one part of the employees cannot be considered without consideration of the whole nexus of employer-employee relationships in the plant.

The draftsmen of the National Labor Relations Act recognized this state of affairs. The National Labor Relations Board must decide whether the bargaining unit shall be "the *employer* unit, craft unit, *plant* unit, or *subdivision* thereof" (§9(b)). The Board must therefore consider in every case whether all employees of an employer or all employees in one plant or certain only of the employees of the employer or the employees in one plant shall be grouped in a bargaining unit. When any employees of an employer or at a plant are to be taken under the aegis of the National Labor Relations Board, all other employees, including foremen, must be taken

into consideration in the exercise of the exclusive jurisdiction of that Board.

If the New York Board is allowed to exercise jurisdiction in the case of the foremen at the one plant here involved, there will be a direct and serious encroachment on the field considered by the National Board in the exercise of its jurisdiction with regard to the employees at this plant and other plants of the same employer. The State Board should not be permitted to tinker with what the National Board has done in the given situation, particularly since there is no way by which the National Board may counteract the results of the tinkering. Congress intended that the National Board, not the State Board, should do the job and has provided no method by which the State Board's errors can be corrected by the National Board.

Here is a question as to the extent to which a particular field has been occupied. We submit that the Act of Congress and the action of the National Labor Relations Board establish beyond a doubt that the decision as to the appropriate unit and the certification of representatives for appellant's foremen lie within the field occupied by the Board. The numerous cases as to the occupation of a field of regulation by Congress support our contention that, even if the Act of Congress had not of itself occupied the field as to these foremen, the action of the National Labor Relations Board certainly has done so.

The cases dealing with the extent of occupation of a field of regulation have already been cited and discussed in Point I-A of this brief (pp. 20-28). A discussion of a few of them, however, may be of value in demonstrating that regulation by the National Labor

Relations Board of rank-and-file employees would constitute an occupation of the field of regulation as to foremen in the same plant, even if the grant of power to the Board did not occupy the field.

In *New York Central R. R. Co. v. Winfield,* 244 U. S. 147, and *Erie R. R. Co. v. Winfield,* 244 U. S. 170, the courts of New York and New Jersey, respectively, had held that awards under State workmen's compensation acts could be made to railroad employees in interstate commerce for injuries not attributable to negligence of the carriers. The State commissions and courts took the position that the Employers' Liability Act, permitting recovery against an employer only when it is guilty of negligence, did not invalidate State regulation where the injuries occurred without such negligence. This Court reversed in each case, holding that the federal act was an occupation of the entire field of compensation for injuries to railroad employees in interstate commerce.

If federal occupation of the whole field of compensation for injured employees takes place when Congress allows compensation for injury due to the employer's fault, is it not clear that federal occupation of the field of collective bargaining of employees in a certain plant has taken place when the National Labor Relations Board makes an order certifying representatives of the rank-and-file employees in that plant?

In *Napier v. Atlantic Coast Line R. R. Co.,* 272 U.S. 605, previously discussed (*supra,* pp. 24-25), the contention was made that Congress's occupation, by the Boiler Inspection Act, of the field of train safety devices did not prevent States from requiring the installation of devices such as fire-box doors and cab curtains, which were primarily for the promotion of health and comfort and

affected safety, if at all, only incidentally (p. 612). This contention was rejected. Congress's grant to the Interstate Commerce Commission of power to prescribe safety appliances was held to be an occupation of the entire field of the equipment of locomotives, and if the Commission had not seen fit to exercise its authority to the full extent, State legislation was nevertheless precluded.

If federal occupation of the whole field of equipment of locomotives takes place when Congress grants the Interstate Commerce Commission power to prescribe safety appliances, is it not clear that federal occupation of the field of collective bargaining of employees in a certain plant has taken place when the National Labor Relations Board makes an order certifying representatives of the rank-and-file employees in that plant?

In *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, also previously discussed (*supra*, pp. 26-27), the Secretary of Agriculture had power to regulate the manufacture of renovated butter, but no power to confiscate packing stock butter, the material from which renovated butter is produced. The State of Alabama undertook to confiscate spoiled packing stock butter. But this Court held that the prohibition of State action was inferable from the scope and purpose of the federal legislation, and that the Alabama officials should be enjoined. Congress's assumption of jurisdiction over the manufacturing process was sufficient to exclude the States from a related matter over which it had not actively exercised power.

When regulation by Congress of a particular matter constitutes an "occupation of the field" as to more or less directly or indirectly related matters, does not regu-

lation by the National Labor Relations Board of the bargaining status of rank-and-file employees constitute a preemption of the field of regulation of foremen in the same plant? The fixing of the status of one group requires the consideration of the status of the other, and a change in the status of one directly affects the status of the other. Determinations of policy in matters so directly interdependent cannot properly be considered to be in separate fields.

It is reasonable and necessary that a partial exercise of power should constitute a setting apart, for exclusive federal regulation, of other parts of the same field which are inextricably connected with the parts actively regulated. The federal regulations should not be closely fenced in, a limited enclave within the State's regulations. Particularly is this true in a case such as the one at bar, where the success of regulation depends largely upon the ability of the National Labor Relations Board to effectuate its policies by judicious action or inaction. A subsequent change by a State board in the bargaining status of foremen would be an encroachment upon the field preempted by the National Board in its determination of a unit for the rank and file.

B. *The National Board's Declaration of Policy as to Foremen Employed in Interstate Commerce Is Sufficient to Terminate Any Jurisdiction of the State Board over Them.*

Not only has the National Labor Relations Board exercised its jurisdiction to certify bargaining representatives for appellant's employees other than foremen. As to foremen themselves, it has at all times made clear its policy and practice. This, either alone or in connec-

tion with its exercise of jurisdiction as to other employees, is enough to cut off appellees' contended-for power to regulate the bargaining status of appellant's foremen.

As we have seen (*supra*, p. 31), when this action was commenced and when it was decided in the court of first instance the policy of the National Labor Relations Board was to refuse to certify representatives of foremen. In *Matter of Maryland Drydock Co.*, 49 N.L.R.B. 733, 739-741, it was explained that this course was adopted to protect the rights of rank-and-file workers. Later, in *Matter of Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B 1212, and other cases mentioned above (p. 32), the Board changed its policy. It now undertakes to certify collective bargaining representatives for foremen. Whether the old or the new policy is right it is unnecessary to inquire. The point is that by its declaration of its policy it had asserted jurisdiction in the matter and thereby foreclosed jurisdiction of the New York Board and all other State boards. Of course it is irrelevant that there was no declaration of policy as to the particular representative which prevailed before the New York Board. There could be no such declaration, because no petition had been filed with the National Board by the union which was certified by the New York Board. But the National Board's policy on the subject was nonetheless clear, and it was flouted by the New York court in this case (*supra*, pp. 31-32). Could there be a clearer case of impingement by State action on rights of rank-and-file employees, which at the time were sought to be protected by the National Labor Relations Board, and upon the jurisdiction of that Board in the premises? *Hill v. Florida*,

325 U. S. 538, is authority *a fortiori* for the reversal of the judgment of the court below.

Of course, the National Labor Relations Board's subsequent reversal of its policy with regard to foremen does not weaken in any way the effect of its previous declaration of policy to the contrary. It exercised jurisdiction in the matter of foremen equally by either policy. It did not relinquish its exclusive power in the premises by declaring that thereafter it would recognize units of foremen as appropriate. To contend that it thereby relinquished its power would be to say that by announcing that in future it would elect to act in a certain way it ratified previous usurpations by State boards of its power to act in that way.

The National Labor Relations Board, therefore, had exercised jurisdiction as to appellant's employees here involved and thereby had precluded the exercise of jurisdiction with regard to them by the New York Board even if the National Labor Relations Act had permitted that board to act in the silence of the National Board. The New York Board, therefore, even on the theory of the New York court that it had jurisdiction until ousted therefrom by the exercise of jurisdiction by the National Board, was without constitutional power to certify a bargaining representative for the foremen at the appellant's Dunkirk plant.

Conclusion.

It is submitted that the judgment of the court below should be reversed and the case remanded, with the direction to enter a declaratory judgment that the appellees have no jurisdiction over the appellant or its supervisory employees at its Dunkirk plant; that the appellees may not properly certify the foremen or other supervisory employees at the said plant as an appropriate unit for collective bargaining; that the appellees have no jurisdiction to hold an election for the purpose of determining a representative of the said employees to bargain collectively with the appellant or to order the appellant to bargain collectively with any such representative; and that the appellees be enjoined from holding such an election or taking any other action in connection with the appellant and its employees at the said plant under the provisions of the New York State Labor Relations Act.

Respectfully submitted,

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APPENDIX A.

Relevant Parts of the New York State Labor Relations Act (New York Laws of 1937, Chapter 443, as amended, 30 McKinney's Consolidated Laws of New York §§700-716).

FINDINGS AND POLICY.—SEC. 700. The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers an even greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchas-

ing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the disparity between production and consumption, (c) to create unemployment with its attendant danger to the health, peace and morale of the people, and (d) to increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state.

DEFINITIONS.—SEC. 701. When used in this article:

* * * * * * *

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

* * * * * * *

RIGHTS OF EMPLOYEES.—SEC. 703. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

UNFAIR LABOR PRACTICES.—SEC. 704. It shall be an unfair labor practice for an employer:

* * * * * * *

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

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REPRESENTATIVES AND ELECTIONS.—SEC. 705. 1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self organization, to collective bargaining and

otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization.

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PREVENTION OF UNFAIR LABOR PRACTICES.—SEC. 706. 1. The board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, media-

tion or conciliation in labor disputes that have been or may hereafter be established by law.

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APPLICATION OF ARTICLE.—SEC. 715. The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act * * * *

APPENDIX B.

Relevant Parts of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. §§151-166).

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively

safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, or the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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SEC. 2. When used in this Act—

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(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states

otherwise, and shall include any individual whose work has ceased as a consequence of, or in conection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

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(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

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SEC. 4 (a)

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The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

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SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

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SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize

any other suitable method to ascertain such representatives.

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SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

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SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

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